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ABSTRACT

Precedent setting court cases are examined to determine the direction the United States is moving in its pursuits of multiculturalism. The support for multiculturalism is discussed in light of: the right of an individual to choose a life style he/she deems desirable; equal educational opportunity and integration; bilingualism; and pluralism for Native Americans. This review illustrates some general principles which courts use in defining American pluralism. It is concluded that the Constitution generally protects citizens from arbitrary or unreasonable control by the government and protects the right of parents to raise and educate their children as they see fit even if this life style is inconsistent with existing social patterns. Courts are found to be reluctant to rule in a broad manner and much more likely to apply certain principles to a specific case in a specific context. Because of this individual treatment, it is expected that multicultural and bilingual education will vary from group to group and situation to situation. (Author/AM)

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Multiculturalism and the Courts

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MULTICULTURALISM AND THE COURTS

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The First and Fourteenth Amendments of the Constitution, our cornerstone for social organization, establishes the protection of pluralistic bodies. In part they read:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof....
No state shall make or enforce any law which shall abridge the privileges of immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

While establishing the principles supporting pluralism, the amendments themselves have not defined the brand of pluralism to be created in the United States. Over the past one hundred years the courts have interpreted and applied these principles to give body to the ideal of cultural pluralism. In what follows we shall review some of the precedent setting cases and note the direction in which we seem to be moving, fleshing out the multicultural nature of the United States.

I. Pluralism: A Right to a Different Way of Life

Parents' Right to Choose

Meyer v Nebraska¹: The Parents' Right to Reinforce Ethnicity

The first quarter of the 20th Century marked a peak in both American immigration and the nativistic reaction against it. In 1919 Nebraska passed a law limiting the use and instruction of languages other than English in schools. In part the law stated:

No person, individually or as a teacher shall, in any private, denominational, parochial or public school, teach any subject to any person in any language other than the English language.

Languages, other than the English language, may be taught as languages only after a pupil shall have attained and successfully passed the eighth grade as evidenced by a certificate of graduation issued by the county superintendent of the county in which the child resides.²

Robert Meyer, a teacher at Zion Parochial School in Hamilton County, Nebraska, was arrested, tried and convicted for teaching the subject of reading in the German language to Raymond Parpart. Raymond, ten years of age, had not attained and successfully passed the eighth grade. Meyer believed, however, that the law violated his rights guaranteed under the Fourteenth Amendment and appealed to the Nebraska Supreme Court. But, the Court did not rule in Meyer's favor. Rather it felt that the state legislature was within its power to regulate education and serve the interest of society. Hence the court stated:

The salutary purpose of the statute is clear. The legislature had seen the baneful effects of permitting foreigners, who had taken residence in this county, to rear and educate their children in the language of their native land. The result of that condition was found to be inimical to our own safety. To allow the children of foreigners, who had emigrated here, to be taught from early childhood the language of the country of their parents was to rear them with that language as their mother tongue. It was to educate them so that they must always think in that language, and, as a consequence, naturally inculcate in them ideas and sentiments foreign to the best interests of this country. The statute, therefore, was intended not only to require that the education of all children be conducted in the English language, but that, until they had grown into that language and until it had become a part of them, they should not in the school be taught any other language. The obvious purpose of this statute was that the English language should become the mother tongue of all children reared in this state.³

Despite the unfavorable ruling, Meyer still thought he should be protected and so appealed to the United States Supreme Court. Here the justices saw things differently than did the Nebraska court. While

they did not disagree with the intent of the law, they did disagree with the means by which assimilation would take place. Speaking for the majority, Justice McReynolds made this point clear when he stated:

Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be covered by methods which conflict with the constitution - a desirable end cannot be promoted by prohibited means.⁴

In the eyes of the Court, the law was overly restrictive. Recognizing that the state has the authority to "do much... in order to improve the quality of its citizens, physically, mentally and morally" the Court also recognized that "the individual has certain fundamental rights which must be respected."⁵ Among the liberties protected by the Fourteenth Amendment is "the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to engage those privileges long recognized at common law is essential to the ordinary pursuit of happiness by free men."⁶ In particular, the Court found the right to teach and the right of parents to engage a teacher to instruct their children to be within the liberties of the Fourteenth Amendment.

In order for the state to restrict such liberties, it must be able to show that it is necessary for the protection of a reasonable public interest. In this case, however, the justices could find no such interest. Rather they concluded "that the statute as applied is arbitrary and without reasonable relation to any end within the competency of the state." Furthermore, the majority found no support for

the state's claim that the purpose was to protect the child's health and well being. They concluded, "the mere knowledge of the German language cannot reasonably be regarded as harmful." Hence, the judgment of the Nebraska Supreme Court was reversed.

The Meyer case is relevant to the concept of pluralism in several respects. First, the Nebraska law shows that strong assimilationists' feelings have played a significant and influential role in our history. As we shall see, this public sentiment has remained with us. Second, the case shows how the Fourteenth Amendment can protect individual liberty and a multicultural way of life from state efforts to eliminate ways different from the majority. Third, we can see that a parent has a right to bring up a child and provide instruction for that child in the way he deems most fitting unless the state can show some reasonable interest to be at stake. We shall qualify this right in future cases.

Wisconsin v Yoder⁷: The Right Not To Attend School

Jonas Yoder and Wallace Miller were members of the Old Order Amish religion and Adin Yutzy was a member of the Conservative Amish Mennonite Church. They and their families resided in Green County, Wisconsin and were subject to Wisconsin's compulsory school attendance law which required them to send their children, Frieda Yoder, age 15, Barbara Miller, age 15, and Vernen Yutzy, age 14, to school until the age of 16. The children had all graduated from the 8th grade of public school but had failed to enroll for further schooling, when the parents were charged with violation of the law.

At trial, the parents' defense was based on religious belief and the

way of life of the Amish community. They believed that compliance with the law was contrary to the Amish religion and that by sending their children to high school, they would not only expose themselves to the danger of the censure of the church community, but also endanger their own salvation and that of their children. High school, and higher education generally, in their minds is seen as being incompatible with their values and way of life. They view secondary education as an impermissible exposure to a "worldly" influence and feel that high school tends to emphasize intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students. Amish society, on the other hand, emphasizes informal learning-through-doing; a life of "goodness", rather than a life of intellect; wisdom, rather than competition; and separation from, rather than integration with, contemporary worldly society.⁸ In addition to these objections, formal high school beyond the eighth grade is contrary to Amish belief because it takes their children away from their community in their formative adolescent years.

It is important to recognize that the Amish are not altogether opposed to compulsory public education. They agreed that elementary education is valuable because their children must have basic skills in the "three R's" in order to read the Bible, to be good farmers and citizens, and to be able to deal with non-Amish people when necessary in the course of daily affairs. However, while Amish accept compulsory elementary education generally, wherever possible they have established their own elementary schools which in many respects resemble the small local schools of the past.

In defense of its compulsory education law, Wisconsin argued that states have the power to regulate public education and that such an interest is paramount. Education prepares individuals to be self-reliant members of society and it is necessary to prepare citizens to participate effectively and intelligently in our open political system. Furthermore, the state of Wisconsin argued that the Amish position would foster ignorance from which the child must be protected.

The lower Wisconsin court found that the compulsory school attendance law did interfere with the freedom of the Amish to act in accordance with their sincere religious beliefs. It also concluded that the requirement of high school attendance was a reasonable exercise of the state's interest. Balancing these interests the Wisconsin trial court found the Amish parents guilty and fined them the sum of \$5 each.

Still believing they were right, the Amish appealed the lower court decision to the United States Supreme Court. The High Court, upon reviewing the case, saw things differently and upheld the Amish position. In its decision, the Court acknowledged the constitutional power of the state to regulate public education. It further noted however, that such power is not unlimited nor totally free from a balancing process when it impinges on fundamental rights and interests. In order for Wisconsin to compel school attendance beyond the eighth grade against a claim that such attendance interferes with the practice of a legitimate religious belief, it must appear either that the state does not deny the free exercise of religious beliefs by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause of the

First Amendment.⁹

The Court's first task was to determine whether the Amish religious faith and their mode of life are, "inseparable and interdependent." The Court held that "a way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief. Although a determination of what is a "religious" belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests. Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary-secular values accepted by the majority their claims would not rest on a religious basis. Philosophical and personal rather than religious belief does not rise to the demand of the Religion Clauses.¹⁰

After reviewing the evidence the justices found the conclusion inescapable that secondary schooling, by exposing Amish children to worldly influences in terms of attitudes, goals and values contrary to beliefs, and by substantially interfering with the religious development of the Amish child and his integration into the way of life of the Amish faith community at the crucial adolescent stage of development, contravenes the basic religious tenets and practice of the Amish faith, both as to the parent and the child.¹¹

In response to the State's argument that continued high school education was necessary, the Court found that the evidence adduced by

the Amish in this case was persuasively to the effect that an additional one or two years of formal high school for Amish children in place of their long-established program of informal vocational education would do little to serve those interests. In this respect, the value of all education must be assessed in terms of its capacity to prepare the child for life. It is one thing to say that compulsory education for a year or two beyond the eighth grade may be necessary when its goal is the preparation of the child for life in modern society as the majority life, but it is another if the goal of education is viewed as the preparation of the child for life in the separated agrarian community that is the keystone of the Amish faith.¹²

Chief Justice Berger, speaking for the majority, concluded that the Amish's claim "must prevail, largely because of religious freedom-- the freedom to believe and to practice strange and, it may be, foreign creeds-- has classically been one of the higher values of our society."¹³

In regard to pluralism, the Yoder case has presented a stronger position than Meyer. We can conclude that a way of life that is odd or even erratic but interferes with no right or interests of others will be protected if that way of life is based on religious beliefs. In this case the Amish were allowed to isolate themselves in order to maintain a different religious subculture. But what practices constitute a threat to the rights and interests of others? We turn now to a clarification of this point.

Qualifications of the Right to Choose

Limitations:

Reynolds v U.S.¹⁴: Polygamy Overruled

In 1878 George Reynolds, a citizen of the territory of Utah, was accused of violating a statute which made criminal polygamous marriages. At the time of his second marriage he was, and for many years before had been, a member of the Church of Jesus Christ of Latter-Day Saints, commonly called the Mormon Church, and a believer in its doctrines. One of the accepted doctrines of the Church, was that it was the duty of male members, circumstances permitting, to practice polygamy. As a member of the Church, Reynolds also believed that this duty was enjoined by different books of divine origin, the Holy Bible included, and that the practice was directly enjoined upon the male members by the Almighty God in a revelation by Joseph Smith, the founder and prophet of the Church. Furthermore, he believed that the failing or refusing to practice polygamy by male members of the Church, when circumstances would admit, would be punishment, and the penalty for such failure and refusal would be damnation in the life to come.¹⁵

In court, Reynolds established that he had received permission from the recognized authorities in the Church, was married by an authority of the Church and the marriage ceremony was performed under and pursuant to the doctrines of the Church. He argued that since the marriage was entered pursuant to and in conformity with a religious duty that he was protected by the First Amendment and therefore should be protected from the statute.

In its behalf, the prosecution called expert witnesses who found

that objections to polygamy were rooted in early English common law and were based on civil (social) moral tenets rather than religious grounds. Testimony was also presented that society would ultimately be harmed by polygamy.

In its decision, the Supreme Court concluded that the statute under consideration was within the legislative power of congress and that the key remaining question was whether those who make polygamy a part of their religion were excepted from the operation of the statute. Making a distinction between religious belief and religious actions, the Court held that laws are made to govern actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. It matters not that Reynolds belief was a part of his religion, to the Court it was still belief and belief only. While Reynolds was free to believe what he wished, he was not free to violate the law established to protect society and the "pure-minded women" and their "innocent children" innocently made victims of such practices.

Prince v Commonwealth of Massachusetts¹⁶: State Protection of Children Upheld

Mrs. Sarah Prince and her nine-year-old niece Betty, for whom she was the legal guardian, were Jehovah's Witnesses. Engaging in what they believed to be their religious duty, Mrs. Prince and Betty would "engage in the preaching work" by distributing "Watch Tower" and "Consolation", two religious publications, to passersby and ask for a 5¢ donation per copy.

This practice, in regard to Betty, was in violation of Massachusetts child labor laws which in part stated, "No boy under twelve and no girl under eighteen shall sell, expose or offer for sale any newspaper, magazines, periodicals or any other articles of merchandise of any description...in any street or public place." Mrs. Prince thought this law to be in violation of Betty's "God-given right and her constitutional right to preach the gospel." The State disagreed, however, and held Mrs. Prince responsible, as Betty's legal guardian, for violation of the child labor law.

The Supreme Court saw two main issues at hand. One was the rights of the parent and child; namely the right of the parent to bring up the child in the way he should go and the right of the child to preach the gospel by public distribution of "Watch Tower" and "Consolation". The second, and to be balanced against the parent's and child's interests, was the interests of society to protect the welfare of children that they be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens. In its decision the Court concluded that "the family itself is not beyond regulation in the public interests, as against a claim of religious liberty." Citing Reynolds, the Court argued that neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interests in youth's well-being the state may restrict the parents' control. Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct in religion or conscience.¹⁷ In this particular case the Court recognized certain situational aspects in the activities in which Betty and Mrs.

Prince were engaged that would be difficult for adults to cope with and wholly inappropriate for children to face. Other than the confrontations one has when soliciting religious material, harmful possibilities of emotional excitement and psychological or physical injury existed. Because of these potential harmful outcomes on Betty, the Court concluded that Massachusetts could restrict Betty's religious activities.

The Reynolds and Prince cases illustrate how and why government might restrict pluralism. Beliefs are always protected but activities associated with these beliefs may be restricted when the state can show the probability of harmful effects to society or individuals. Other cases support this position. Courts have held that compulsory vaccination is a reasonable exercise of state power¹⁸ as is the requirement of parents to provide competent medical treatment for children when their health is seriously threatened.¹⁹

Support for Pluralism:

Pierce v Society of the Sisters²⁰: Private Education Upheld

The 1923 Oregon Compulsory Education Act, required parents and guardians to send their children to a public school. The Society of Sisters was an educational corporation which operated primary schools, high schools, junior colleges, and orphanages. The primary schools taught the subjects usually pursued in Oregon public schools but also included systematic religious instruction and moral training according to the tenets of the Roman Catholic Church. The Society claimed that the enforcement of the Compulsory Education Act was in violation of

the First and Fourteenth Amendments because it conflicted with the rights of parents to choose schools where their children would receive appropriate mental and religious training and the right of schools to engage in a useful business.

As in other cases the Supreme Court recognized "the power of the state reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare."²¹

In reviewing the facts, the Court found nothing in the record to indicate that the Society of Sisters had failed to discharge their obligations to patrons, students, or the state. Under the doctrine of Meyer the Court declared the Compulsory Education Act to unreasonably interfere with the liberty of parents' and guardians' to direct the upbringing and education of children under their control. In an oft quoted passage the Court stated: "The child is not the mere creature of the state; those who nurture him and direct his destiny have the right coupled with the high duty, to recognize and prepare him for additional obligations."²²

This case supports the findings in Meyer and Yoder: parents have the right to control the upbringing of their children by choosing the type of educational experiences most appropriate. But these cases refer to private schools; what of parents' rights to protect their children in public schools? Must parents send their children to private

schools to preserve and/or foster a way of life different than the majority? The Barnette case addresses this issue.

Barnette v West Virginia²³: Mandatory Flag Salute Overruled

As many states West Virginia required the children in its public schools to salute the flag as a part of its regular school program. Walter Barnette, however, believed the pledge to violate his religious principles. As a Jehovah's Witness he based his belief on a passage in Exodus which reads: "Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above that is in the earth beneath, or that is in the water under the earth; Thou shalt not bow down thyself to them nor serve them." He, consistent with his faith, considered the flag as an "image" within this command. For this reason he refused to salute it.

In reviewing the evidence the Supreme Court concluded that the freedom asserted by Barnette did not conflict with the rights of other individuals. Neither did the issue, as the Court saw it, rely heavily on Barnette's religious views. Rather it recognized that "many citizens who do not share these religious views hold such a compulsory right to infringe constitutional liberty of the individual."²⁴ Rather, "free public education, if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any class, party, or action."²⁵

This ideal is eloquently stated in the following passage:

...freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act of faith therein. If there are any circumstances which permit an exception, they do not now occur to us.²⁶

Public Neutrality Reaffirmed

The Schempp and Murray Cases²⁷: Prayer Disallowed in Public Schools

Pennsylvania and Maryland each had laws providing for nondenominational religious activities in the public schools. The Pennsylvania statute required that at least ten verses from the Holy Bible shall be read, without comment, at the opening of each school day and that any child may be excused from the Bible reading upon written request of his parents or guardian. The Maryland statute provided for the reading without comment, of a chapter in the Holy Bible and for the use of the Lord's Prayer. This rule was amended to permit children to be excused from the exercise on their parents' request.

The court actions against these practices were initiated separately in their respective state courts. The United States Supreme Court saw the issues of the two as being substantially the same and, on appeal, handed down one opinion for both. After reviewing past cases the Court reaffirmed public neutrality and the separation of church and state and declared that Bible reading and prayers, both compulsory and voluntary, in the schools were unconstitutional.

The Right To Choose: Conclusions

The cases considered up to this point suggest that pluralism might best be understood as an individual's right to choose and pursue the way

of life he deems desirable for himself and his children. The Constitution generally protects citizens from arbitrary or unreasonable control by the government. Thus, Meyer, Yoder and Pierce illustrate the right of parents to bring up and educate their children as they see fit even if this life style is inconsistent with existing social patterns.

Religion played a significant role in several of the cases. This is because the Constitution specifically singles out religious pluralism to be protected. Religious claims, then, are among the strongest to receive recognition in support of pluralistic ideals. Based on religious principles Yoder illustrates that a way of life separate and different from the mainstream of society can be supported. It also suggests, however, that the same way of life will not be supported on strictly secular grounds.

The courts have also recognized a distinction between pursuing pluralistic goals publicly and privately. In general, the courts advocate governmental neutrality. This is particularly true with religious pluralism. Thus Barnette and Schempp illustrate that public (governmental) institutions must not support the development of any one religion or, for that matter, religion at all. But because this is true, if an individual or group wishes to protect and insure the well being of its way of life it must do so through private institutions. Meyer, Pierce and Yoder each involved the protection of a group to perpetuate itself through private means. These groups could not have successfully demanded that public institutions support their ways of life. To the contrary, excluding religious neutrality, the state does have the power to pursue cultural, philosophical and political goals

throughout its public institutions. Barring a compelling interest, however, it does not have the power to force individuals and groups to participate in these institutions. Thus the courts language in Meyer questioned the means of reaching assimilationist goals but not the goals themselves. We shall pursue this further in the next section.

II. Equal Educational Opportunity: Integration and Assimilation

The social organization governing the separation or integration of culturally, ethnically and racially different groups in the United States will have profound implications for pluralism. Theorists have suggested alternative organizational models ranging from the virtual separation of groups to a completely assimilated and open society. Court precedent too has contributed to the type and frequency of social interaction among groups.

Early court decisions established a legal base for the separation of racial groups. In 1896, in Plessy v Ferguson²⁸, the United States Supreme Court upheld a Louisiana statute that provided for "equal but separate accommodations for the white and colored races on passenger trains." The Court applied the test of reasonableness to the legislation which permitted separate accommodation for Blacks and concluded that the state must have broad discretion to decide what was reasonable with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of the public peace and order. Applying this standard, the Court concluded that the law was not unreasonable.

While we recognize the racists intentions and implications of such

a law today, the court decision provided the support for separate but equal schools.*

Brown v Board of Education²⁹: School Desegregation

In 1949 Kansas passed a law permitting the establishment of separate school facilities for Black** and White students. Pursuant to that authority, the Topeka Board of Education elected to establish segregated elementary schools. In a class action suit Oliver Brown, a student, challenged the constitutionality of segregated schools, claiming that such an arrangement, when conducted by officials pursuant to law, violated the equal protection clause of the Fourteenth Amendment.

The District Court found that segregation in public education has a detrimental effect upon Black children, but, using Plessy as precedent, denied relief on the grounds that the Black and white schools were substantially equal with respect to buildings, transportation, curricula, and educational qualifications of teachers.³⁰ Brown appealed to the Supreme Court where his case was heard along with similar cases from South Carolina, Virginia and Delaware.

In the decision, the Court addressed itself to the question, "Does segregation of children in public schools solely on the basis of race

*Though the law was blatantly racist it provided the support for at least one very narrow view of pluralism. The separation of different groups decreases the probability of cultural diffusion and increases the probability of the group maintaining its cultural uniqueness. Thus, in Yoder, the Amish sought to separate themselves as have other groups in the establishing of parochial schools.

**Though the statute referred to the separation of Negroes and White students, in deference to more acceptable contemporary labels we refer to Black students in many parts of the paper.

even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal opportunity?"³¹ The Court first viewed the contemporary context of the case and decided that it must be determined, not on the basis of conditions existing when the Fourteenth Amendment was adopted, but in the light of the full development of public education and its present place in American life throughout the nation.

The Court held that in the present context "to separate minority students from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."³² These findings were based on statements by experts who testified that segregation of White and Black children in public schools has a detrimental effect upon the Black children and that the impact is greater when it has the sanction of the law. The experts believed that the policy of separating the races is usually interpreted as denoting the inferiority of the Black group and that this sense of inferiority affects the motivation of a child to learn. Segregation with sanction of the law, therefore, has a tendency to retard the educational and mental development of Black children and to deprive them of some of the benefits they would receive in a racially integrated school system.³³

On the force of these arguments, the Court concluded "that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal" and violate the equal protection of the laws guaranteed by the Fourteenth

Amendment.

The implications of Brown were clear: school districts which sanctioned the separation of races must desegregate. Because of the complexities involved and the probable impact of the decision, the Court gave all interested parties a year to study the situation, reconvene, and make proposals on how to proceed. The result was Brown II.³⁴

The first Brown case declared the fundamental principle that racial discrimination in public education is unconstitutional. In Brown II the Court said: "All provisions of federal, state, or local laws requiring or permitting such discrimination must yield to this principle."³⁵ Local school authorities would have the primary responsibility for elucidating, assessing and solving the problems. District courts would be responsible to see that public schools comply with all deliberate speed. Furthermore, the burden would rest upon the defendants to establish that their actions are in the public interest and are "consistent with good faith compliance at the earliest practicable date."³⁶

The immediate impact of Brown I and Brown II, of course, was felt in the South where segregated schools were common and sanctioned by law. The initial reaction of many southern districts, predictably, was one of resistance. This resistance led to a series of court decisions which clarified and strengthened Brown.

Griffin v County School Board³⁷: The Closing of the Schools

In 1959, faced with an order to desegregate, the County Board of Supervisors of Prince Edward County, Virginia, refused to appropriate

funds for the operation of public schools. In place of the county schools a private foundation was created which operated schools for White children only. In addition, these children were eligible for county and state tuition grants to help defray the cost of private schools. Public schools continued to operate elsewhere in the state.

After protracted litigation in the federal and state courts, the Supreme Court, in 1964, struck down the County's private school strategy to avoid integration as unconstitutional. The Court declared that "under the circumstances of the case, closing of the Prince Edward County public schools, while at the same time giving tuition grants and tax concession to assist White children in private segregated schools, denied petitioners (Black students) the equal protection of the laws guaranteed by the Fourteenth Amendment."³⁸ In support of this claim the Court noted that: (1) Prince Edward County school children are treated differently from those of other counties since they must go to private schools or none at all; and (2) the public schools of Prince Edward County were closed and private schools operated in their place only for constitutionally impermissible reasons of race. In the words of the Court: "Whatever non-racial ground might support a state's allowing a county to abandon public schools, the grounds of race and opposition to desegregate do not qualify as constitutional."³⁹

Green v County School Board⁴⁰: Freedom of Choice Overruled

The Griffin case illustrates one blatant attempt to frustrate desegregation. But not all school districts sought openly to avoid the law. Many searched earnestly for an acceptable compromise. One

such attempt was a freedom of choice plan developed by the school board of New Kent County, Virginia.

At the time of the proposal, New Kent County was a rural county in Eastern Virginia with about half of its population being Black. There was no residential segregation in the county; persons of both races resided throughout. The school system had only two schools, the New Kent School on the east side of the county and the George Watkins School on the west side. New Kent School was a combined elementary and high school, serving the white population, while Watkins served the combined elementary and high school Black population. There were no attendance zones. Each school served the entire county with twenty-one buses transporting students to their respective schools. It is also important to note that the segregated system was initially established and maintained under the compulsion of Virginia constitutional and statutory provisions mandating racial segregation in public education.

In 1965, in order to remain eligible for federal financial aid under the Civil Rights Act of 1964, the school board adopted a "freedom-of-choice" plan for desegregating the schools. Under the plan each pupil, except those entering the first and eighth grades, would annually choose between the New Kent and Watkins schools. Pupils not making a choice would be assigned to the school previously attended. First and eighth graders were required to make an affirmative decision. The school district argued that such a plan completely satisfied the requirements of the Brown decision since every student, regardless of race, might freely choose which school to attend. They further argued that their plan could only be held unconstitutional if the Fourteenth Amendment

was read as universally requiring compulsory integration.

Charles Green and other students, however, thought the plan was unconstitutional and filed suit against the school board. In their suit they argued that despite the freedom-of-choice, to the extent that schools remained segregated the district had not yet met compliance.

The Court, in its decision, ruled in favor of Green. Rejecting the school board's reasoning, the Court held that "the transition to a unitary non-racial system of public education was and is the ultimate end to be brought about."⁴¹ "School boards such as the respondent operating state-compelled dual systems at the time of Brown II were clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."^{42*}

The significance of Green to pluralism is in the clearly stated affirmative stance to integration. Brown ruled against the intentional segregation of schools. Green ruled that not only its intentional segregation unconstitutional, segregated schools systems must be dismantled "root and branch". The criteria for compliance, then, will be evidence of integration. This principle was further developed and

*While the freedom-of-choice plan was not sufficient, this should not be interpreted as an overruling of all freedom of choice plans. In the Court's words, "All we decide today is that in desegregating a dual school system a plan utilizing freedom-of-choice is not an end in itself." The Court's key consideration in the ruling was the development of "a plan that promises realistically to work, and promises realistically to work now." As we shall see in Swann, the Court supported a modified freedom of choice plan which allowed for a student to transfer from a school where he was the racial majority to a school where he would be in the racial minority. We shall also see that in such plans the school district must provide the transferring student free transportation and available space in the school to which he desires to move.

clarified in Swann v Board of Education.

Swann v Board of Education⁴³: Clarifying Desegregation Guidelines

In reviewing a North Carolina case in 1970, fifteen years and numerous cases after Brown, the Supreme Court recognized a need to "try (and) amplify guidelines...for the assistance of school authorities and courts" in dealing with further desegregation cases. As an illustration of this necessity the Court pointed to the Fifth Circuit where there had been 166 appeals in school desegregation cases between December, 1969 and September, 1970. The case chosen for consideration involved a school system in Charlotte, North Carolina. The case was typical in that the segregation of the district's schools was the result of earlier policies sanctioned by law and that efforts to dismantle the dual systems had been ineffective. Of 84,000 students attending 107 schools, approximately 29% (24,000) were Black, about 14,000 of whom attended 21 schools that were at least 99% Black. Petitioner Swann, relying on Green which required school boards to "come forward with a plan that promises realistically to work... now" sought further relief.

The Court identified four areas to which to address itself⁴⁴:

- 1) to what extent racial balance or racial quotas may be used as an implement in a remedial order to correct a previously segregated system;
- 2) whether every all-Black and all-white school must be eliminated as an indispensable part of a remedial process of desegregation;
- 3) what the limits are, if any, on the rearrangement of school districts and attendance zones, as a remedial measure; and

- 4) what the limits are, if any, on the use of transportation facilities to correct state-enforced racial school segregation.

In response to each question the Court held:

- 1) Racial quotas: The constitutional command to desegregate schools does not mean that every school in the community must always reflect the racial composition of the system as a whole,...the...very limited use of the racial ratio - not as an inflexible requirement, but as a starting point in shaping a remedy-- is acceptable.⁴⁵
- 2) One race schools: While the existence of a small number of one-race, or vertically one-race, schools does not in itself denote a system that still practices segregation by law, the court should scrutinize such schools and require the school authorities to satisfy the court that the racial composition does not result from present or past discriminatory action on their part.⁴⁶
- 3) Attendance zones: A student assignment plan is not acceptable merely because it appears to be neutral, for such a plan may fail to counteract the continuing effects of past school segregation. No rigid rules can be laid down to govern conditions in different localities.⁴⁷
- 4) Transportation: The remedial technique of requiring bus transportation as a tool of school desegregation is within the court's power to provide equitable relief. An objection to transportation of students may have validity when the time or distance of travel is so great as to risk either the health of the children or significantly impinge on the educational process.⁴⁸

In addition to the above, the Court also held that neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once a unitary system has been achieved.⁴⁹

To summarize the findings of Green and Swann, we can conclude that dual educational systems must be dismantled. Integration between races will take place in schools where there is evidence that the segregation is due to governmental action. This does not mean that schools must have a fixed racial balance or that no one-race schools

may exist. However, in such cases where one-race schools do exist the school district must show that the racial composition is not a result of discriminatory action. In pursuit of desegregation the courts may manipulate attendance zones and require busing. Once a dual system has been dismantled local authorities must see to it that future school construction is not used and does not serve to perpetuate or re-establish a dual-system.⁵⁰

Johnson and Lee Cases: Voluntary Ethnic Separation Denied

The effects and application of Brown, Green and Swann were not confined to the South. In Johnson v San Francisco⁵¹ a suit was filed against the San Francisco Unified School District to achieve the racial integration of the public schools. Despite San Francisco's claim that, unlike southern school districts, the racial separation in the schools was a result of residential de facto segregation, the district court found San Francisco to be in violation. The court based its decision on the view that any action, rule or regulation "by school authorities which creates or continues or heightens racial segregation of school children is de jure." If a school board draws attendance lines that provide for reasonable racial balance, and if solely by virtue of population mobility the racial balance of the school becomes lopsided, that segregation is de facto. However, if the school officials were aware of the population shift and drew attendance lines year after year, "knowing that the lines maintain or heighten racial imbalance, the resulting segregation is de jure." Because San Francisco's schools were segregated and because no evidence was presented to show that the

school authorities had ever changed any attendance boundaries for the purpose of eliminating racial imbalance, the court found de jure segregation. The court further acknowledged that school board members may act in all innocence, yet if their official action "creates or continues or increases substantial racial imbalance in the schools, the action is de jure." The court, in a detailed plan, directed the school district to desegregate.

The San Francisco plan to desegregate was far reaching and affected many ethnic groups. One aspect of the plan was the reassignment of pupils of Chinese ancestry to certain elementary schools away from their neighborhoods. Prior to the implementation of the plan the neighborhood elementary schools which the Chinese Americans attended were predominantly Chinese-- in one 456 out of 482, in a second 230 out of 289, and the third, 1,074 out of 1,111. Chinese American parents objected to the reassignment of their children and filed suit on their behalf. In Guey Heung v Johnson⁵² they requested the school district and the courts continue the pattern of neighborhood schools to allow children of Chinese ancestry to attend school together. The parents argued that important cultural values could not be preserved and passed on to future generations if the children were dispersed throughout the city. In addition to the Chinese cultural heritage, the parents believed the very survival of their language might be in jeopardy if their children could not remain together.

In reviewing the request Justice Douglas, speaking for the Court, first turned to California history and found that until 1947 California Education Code provided for the governing board of any school district

to "establish separate schools for Indian children...and for children of Chinese, Japanese or Mongolian parentage."⁵³ Based on this fact and the finding of the Johnson case Douglas relied on the principles established in Brown and Swann. Because there was no evidence to show that the San Francisco authorities had effectively eliminated all vestiges of earlier state-imposed segregation, the Chinese request for segregation was denied.

In language supportive of the ideal of integration Douglas approvingly quoted the lower district court.

"The Judgement and Decree now to be entered is of less consequence than the spirit of community response. In the end, that response may well be decisive in determining whether San Francisco is to be divided into hostile racial camps, breeding greater violence in the streets, or is to become a more unified city demonstrating its historic capacity for diversity without disunity.

"The school children of San Francisco can be counted upon to lead the way to unity. In this and in their capacity to accept change without anger, they deserve no less than the whole-hearted support of all their elders."^{54*}

The language in Lee clearly emphasizes a brand of pluralism incorporating integration. This decision might be contrasted with the Yoder decision discussed earlier. In terms of pluralistic ideology the two cases may seem inconsistent with each other. Yoder allowed the Amish to separate themselves while Lee required the Chinese to integrate. There are some important differences between the cases, however.

First, while both argued that certain cultural qualities were at stake, the Amish sought relief on religious grounds while the Chinese

*In deference to the court it should be pointed out that while the segregation plan was upheld, the court did recognize the interests and concerns of the Chinese parents and noted that the plan made possible bilingual classes as well as courses that taught the "cultural background and heritages of various racial and ethnic groups.

based their arguments on strictly ethnic variables. Secondly, the Amish were attempting to withdraw from the public schools and rely on their own informal private institutions to further religious and cultural security. The Chinese, on the other hand, sought to use the public schools for cultural support. It is quite probable that the Chinese could establish private schools that would support their cultural ideals much as religious groups have established parochial schools. (See Meyer and Pierce.) In protecting groups from unreasonable governmental intervention, the First and Fourteenth Amendments provide for groups to perpetuate and reinforce their cultural life styles. But, this must be a private undertaking. It also seems clear that while government must enforce neutrality in public institutions in regard to religious ideology, cultural and social ideology is another matter. Governmental institutions, schools in particular, may reinforce those doctrines, values and life styles that it deems venerable. In this respect compulsory integration might be characterized as reinforcing an assimilationist ideology.

III. Bilingualism, Integration and Assimilation

Initially the Brown decision was seen as affecting primarily the relationships between whites and Blacks. But as court cases moved north and west it became evident that other ethnic groups would be affected as well. Several cases in Texas (Hernandez v Texas⁵⁵; Cisneros v Corpus Christi⁵⁶) identified Hispanos as an identifiable class and, as we have seen, Johnson identified the Chinese. Cases involving these groups were complicated by the fact that students

often came to school with a dominant language other than English. Integrating the schools, then, sometimes resulted in mixing non-English speaking children with children and teachers that spoke only English. Increasingly courts have taken these variables into consideration.

U.S. v Texas⁵⁷: Bilingualism for Integration

In a desegregation suit the San Felipe Del Rio Consolidated Independent School District was found in violation of the Fourteenth Amendment as set forth in Brown on the basis of its discrimination against Mexican-American students. In a move to dismantle the dual system "root and branch", the court adopted a plan which included extensive bilingual and bicultural components. The school district, however, questioned the legitimacy of these programs.

In its decision the appeals court first acknowledged Mexican-Americans to be an identifiable minority "subject to protection under Title 6 of the Civil Rights Act of 1964 and the Fourteenth Amendment, as applied to racial and ethnic discrimination in public schools."⁵⁸ Moving to the question of necessity of bilingual and bicultural components in the schools, the court was particularly impressed by expert testimony describing problems commonly faced by Mexican-American students. The evidence showed that "Mexican-American students exhibit numerous characteristics which have a casual connection with their general inability to benefit from an educational program designed primarily to meet the needs of so-called Anglo-Americans. These characteristics include 'cultural incompatibilities' and English language deficiencies-- two

traits which immediately and effectively identify those students sharing them as members of a definite group, whose performance norm habitually will fall below that of Anglo-American students who do not exhibit these traits."⁵⁹

Next, the court raised the question of the relationship between these characteristics and the establishment of a unitary school system. Ruling in support of the bilingual programs the court concluded:

Little could be more clear than the need in the newly consolidated school district created as a result of this court's earlier order for special educational consideration to be given to the Mexican-American students in assisting them in adjusting to those parts of their new school environment which presents a cultural and linguistic shock...The Anglo-American students too must be called upon to adjust to their Mexican-American classmates, and to learn to understand and appreciate their different linguistic and cultural attributes. The process will not only constitute an educational enrichment but, also will bring the school system as a whole closer to that goal or state-of-being referred to by the Supreme Court as a 'unitary system.'⁶⁰

Thus the court upheld bilingual and bicultural programs as a vehicle for the attainment of a unitary school system with "true integration as opposed to mere desegregation." The court also ruled that programs were not only to be for the minority students but for Anglo students as well, to facilitate integration and interaction among the two groups. The programs, then, are a means to facilitate this smooth, successful transition. But, for some the value of bilingualism has not been in its assimilation function, but rather its ability to provide equal educational opportunity for non-English speaking students.

Lau v Nichols⁶¹: Bilingualism and Equal Educational Opportunity

The requirement of bilingual education to achieve equal educational opportunity rests on the premise that when English is the only means of

instruction, students who do not understand English are effectively foreclosed from any meaningful education. This was the claim in Lau v Nichols. Following the desegregation of the San Francisco school system in 1971, evidence showed that there were 2,856 students of Chinese ancestry in the school system who did not speak English. Of those who did not speak English, about 1,000 received supplemental courses in the English language. About 1,800, however, did not receive supplemental or bilingual instruction.

The class action suit was brought by thirteen non-English speaking Chinese American students. These students alleged that they were being effectively denied an education because they could not comprehend the language in which they were being taught.* They argued that the failure to either teach them bilingually or teach them English should be prohibited on the grounds that 1) a failure to do so was a violation of equal protection under the Fourteenth Amendment, and 2) it was a violation of the Civil Rights Act of 1964.

The facts clearly supported the claims that the non-English speaking Chinese were not benefiting from their educational experience. Indeed, the School District noted the frustration and poor performance created by the students' inability to understand the regular work and predicted substantial numbers would "dropout and (become) another unemployable (person) in the ghetto." The District argued, however, that this did

*Interestingly, bilingual education was not specifically sought but only that the Board of Education be directed to apply its expertise to the problem and rectify the situation. Teaching English to the students would be one choice, giving instruction to them in Chinese would be another.

not constitute discrimination because the students were being taught in the same facilities, and by the same teachers, at the same time as every one else.

The district court and the circuit court of appeals both ruled that the school district was right. The arguments in support of this ruling focused primarily on the fact that the alleged violation was not based on prior segregation. "More importantly," the appeals court stated, "there is no showing that appellants' lingual deficiencies are at all related to any such discrimination."⁶² The court suggested, then, that the students' failure was of their own making, not state-related, and thus of little consequence when school resources were limited. The court further observed that: "Every student brings to the starting line of his educational career different advantages and disadvantages, caused in part by social, economic and cultural background, created and contributed completely apart from any contribution by the school system. That some of these may be impediments which can be overcome does not amount to a 'denial' by the (school district) of educational opportunity...should the (district) fail to give them special attention."⁶³

On appeal to the Supreme Court, the lower court's decision was reversed. The higher court's opinion supported the arguments presented at trial by the Chinese-speaking students that basic English skills are at the very core of what these public schools teach. Imposition of a requirement that before a child can effectively participate in the educational program he must already have acquired these basic skills is to make a mockery of public education. We know that those who do not

understand English are certain to find their classroom experiences wholly incomprehensible and in no way meaningful."⁶⁴

While the court laid to rest the argument that equal access to the facilities provides equal treatment and equal educational opportunity, it did not base its decision on a constitutional requirement. Rather, support was found in the Civil Rights Act of 1964. The Act, passed by Congress, forbids any agency receiving federal financial assistance to discriminate against a person on the grounds of race, color or national origin. Because the support for the ruling came from the Civil Rights Act, there is still not a constitutional right to a bilingual education, or even an education from which one can benefit. A district, then, which does not receive federal funds, would not be compelled to offer non-English speaking students bilingual education. The constitutional issue has been raised elsewhere, however, with some support.

Serna v Portales Municipal Schools⁶⁵: A Constitutional Test

The Serna case is remarkably similar to Lau and was working its way through the courts at approximately the same time. The city of Portales, New Mexico, is residentially segregated. Mexican-Americans inhabit the northside of the city while Anglos inhabit the southside. The elementary schools are residentially located and therefore reflect the ethnic composition of their respective neighborhoods. The focal point of the action pivoted around the education offered in one of the Mexican-American elementary schools. Plaintiffs asserted that educational discrimination existed throughout the Portales school system as a result

of an educational program which was tailored to educate the middle class child from an English speaking family, without regard for the educational needs of the child from an environment where Spanish is the predominant language spoken. Such a program, it was claimed, is a denial of equal educational opportunity to the Spanish-surnamed children.

As in the Lau case, the plaintiffs presented evidence that the Spanish-speaking children's achievement was consistently lower than the children at other schools. They did not claim that this was due to differential treatment in regard to facilities, teachers and program. To the contrary, they argued that lower achievement resulted because school programs were substantially the same. Furthermore, they did not argue that the present system was in any way the result of state action. The Portales School District basically defended its position in the same manner as did San Francisco. Because the needs of the non-English speaking students did not result from state action and the district did not create these problems through any classification or racially motivated discrimination, they were under no legal obligation to provide compensatory programs.

The district court that tried the case, unlike the trial court in Lau, was not interested in the fact that the situation of Mexican-American students did not result from state action. Placing its decision squarely on the constitutional issue, the court concluded that when children are placed in a school atmosphere which does not adequately reflect the educational needs of the minority, the conclusion becomes inevitable that the children do not, in fact, have equal educational opportunity and that

a violation of their constitutional right to equal protection exists.

Unfortunately, this line of reasoning was not tested in high courts. While on appeal to the circuit court, the Supreme Court handed down the Lau decision. The appeals court, in light of this decision, refused to rule on the constitutional issue of equal protection and upheld the ruling as a violation of the Civil Rights Act.

While the constitutional right to bilingual education would serve as a stronger base to support programs, the Civil Rights Act and the Constitution have basically the same implications for pluralism. In no case was bilingualism or biculturalism supported on the grounds that they contributed to the development or preservation of one's cultural heritage. To the contrary, where bilingual programs have been mandated by the courts it has been to enhance assimilation. Thus in U.S. v Texas it was to create a "unitary" integrated system that went beyond the "mere mixing of races." In Lau the programs were established to teach non-English speaking Chinese students English so that they could benefit from the English-oriented program. While Serna probably provides the strongest support for bilingualism under the ruling that "a student who does not understand the English language and is not provided with bilingual instruction is therefore effectively precluded from any meaningful education," the objective remains the same and bilingualism is simply seen as a vehicle to integration.

Two other observations on integration might be made before leaving bilingualism. First, in the Lau decision Justice Blackmun qualified his support for such programs by pointing to numbers. "When, in another case, we are concerned with a very few youngsters...I would not regard

today's decision...as conclusive upon the issue... For me, numbers are at the heart of this case..."⁶⁶ This qualification was echoed by the appeals court in Serna.

Second, and on a positive note, in a school desegregation case involving Mexican-Americans, Keyes v Denver⁶⁷, a federal judge allowed several elementary schools to remain segregated upon the request of parents. In support of this move the judge stated: "Some representatives of the Mexican-American community...have expressed a desire not to desegregate...during the period that the (desegregation) program is developing. The court can see advantages in this and therefore holds that desegregation is not in its best interest..."⁶⁸ "...In some of the schools which have a preponderant Chicano population it has seemed to the court more desirable to pursue bilingual and bicultural programs than to change the numbers."⁶⁹

On the surface the separation allowed by Keyes seems inconsistent with the Lee decision where Chinese-Americans were forced to integrate. However, we need to recall the guidelines set down in Swann. In Swann the Supreme Court recognized that there may be some instances where schools could remain one-race schools. Inaccessability was one such instance and serves as one of the justifications in Keyes.

IV. Native Americans: A Special Case of Pluralism⁷⁰

In several respects Native Americans are unique from other ethnic groups in the United States. Because of their rather unique position many of the legal principles we've discussed in regard to other ethnic groups are not applicable. Perhaps the most significant difference has

to do with Indians' status in relation to the Federal Government and states. In the leading case of Worcester v Georgia⁷¹, the Supreme Court held that Indian tribes had the unique status of being a nation within the United States. The Court described the Indian nations as a distinct, independent political community where "nation" was interpreted to mean "a people distinct from others" in the traditional sense implied by nations of the world. The result of the decision was that the state of Georgia could not regulate the internal affairs of the Cherokee Nation. In 1959 this principle was upheld in a ruling in a dispute between Arizona and the Navajo⁷². But if Indian tribes are to be considered nations, they are a special type of nation in the eyes of the government. In the earlier decision the Court went on to describe them as "domestic dependent nations" whose relation to the federal government "resembles that of a ward to his guardian."

The status of Indian tribes as nations has several consequences relevant to our discussion. One such consequence is that it removes them from state control and regulation and places them under the control of the United States government. Congress in regard to Indians, then, has assumed the power the states typically hold over other ethnic groups. This power encompasses the manner in which education is to be provided. With this unique relationship in mind, then, we turn to issues of pluralism for Native Americans.

Are Racially Identifiable Schools Permissible?

We have seen in Brown and its progeny that public school segregation on the basis of race and ethnicity is unconstitutional. The constitutional

propriety of federal schools for Indians presents an entirely different issue because Indian schools are a distinct, independent, political community. Through the exercise of the constitutional power to make treaties, wage war, and regulate commerce with Indian tribes, the Federal Government has set aside geographically and politically separate areas to be occupied by Indians. Although assistance has been provided over the years to those Indians who wish to relocate in urban areas, federal policy has been directed primarily toward support and protection of the integrity of tribal self-government on reservations. Federal schools typically serve those Indians who have maintained a geographic and social separation from the mainstream of society. Indian schools, then, tend to reinforce a brand of pluralism akin to separation. It is important to note, however, that the separation is the result of geographic and political separation of Indian nations and not designed to promote racial segregation. One evidence of this can be seen in the fact that white children have been eligible for enrollment in "Indian" day and boarding schools upon payment of tuition.

Geographic isolation aside, there are some grounds for maintaining or creating Indian schools. This would be the case if it could be shown with some certainty that the maintenance of an identifiable racial school conferred a benefit on Indian children. For example, the government may discharge its trust responsibilities by operating schools designed to provide specialized training for gifted Indian artists from rural areas, (e.g. The Institute of American Indian Arts in Santa Fe, New Mexico) or to provide a higher quality vocational program than would otherwise be

available to reservation Indians. (e.g. The South-Western Indian Polytechnic Institute in Albuquerque, New Mexico.)

May the Government Support Indian Community-Controlled Schools?

The Federal Government and states have been prohibited from supporting religious education. We have also seen that state funds could not be used to support racially segregated private schools (Griffin). There is a precedent, however, for federally funded Indian schools. Indeed this has been an obligation of the government in its guardian position. It should also be recognized that it makes no difference whether the government operates its own schools (e.g. BIA) or contracts that responsibility to another party (e.g. Indian tribes). It does not follow from this fact, however, that Indian community schools could discriminate against non-Indian students. If an Indian community school was supported to a significant extent by programs not designed for Indians (compare Johnson-O'Mally funds with Title I funds) then the school probably could not give preference to Indians in admission nor could it in any other way discriminate on the basis of race.

A separate issue is whether an Indian community school which is funded by the government may exclude non-Indians from the school board. The answer is probably "yes". Where educational programs on the reservations are administered by Indian tribes, by tribally chartered corporations, the constitutional policy of tribal sovereignty should prevail.

State Created Indian Schools

May a state deliberately create a racially imbalanced school district at the request of Indians? Ordinarily, such state action would not be consistent with applicable constitutional standards. But, because of their historical relationship with the Federal Government, Indians occupy a unique position under the Fourteenth Amendment. Consequently, there are circumstances which will justify a departure from the general rule.

In many instances geography provides the compelling explanation for the creation of racially imbalanced Indian school districts. Not considering geographic justification, however, when the effect of re-drawing school district boundaries is to increase racial separation equal protection problems are normally raised (Brown). Presently it is not clear if this obstacle can be overcome. The basis for such an argument would lie in (1) the tradition of sovereignty enjoyed by Indian nations and (2) the supremacy clause of the Constitution which makes state authority subordinate to federal authority. The sovereignty argument, simply stated, is that since Indian nations are sovereign they should be able to establish their own school districts. The supremacy argument is based on the fact that federal policy has led to the creation of Indian reservations and calls for their perpetuation. Thus, the policy is one of autonomy and separation. Since state action is subordinate to federal policy, states should allow this separation to continue.

The conflict, however, is in the fact that the Fourteenth Amendment is also supreme law. If the separation of Indian districts could be

shown to be discriminatory it would be possible to rule it unconstitutional. One author believes this obstacle could be overcome in most cases, particularly if no prior de jure segregation was involved and the separation was at the requests of the Indian group.⁷³

Although this discussion of Indian policy is extremely brief it should be clear that Indians are in a rather unique position in respect to legal issues supporting pluralism. Unlike other ethnic and cultural groups it seems possible for Indians to maintain cultural separation if they choose. Furthermore this separation can often be supported by public funds. It should also be noted that while Indians may separate themselves, states may not discriminate against them anymore than any other ethnic group. Thus, Indian children have a right to attend integrated public schools where it is geographically feasible and have the right to an education from which they can benefit.

V. Implications for Multicultural Program Design

Multicultural and bilingual education are generally thought to be logical extensions of the cultural pluralism ideal. As we have seen, the primary support for this ideal is found in the First and Fourteenth Amendments of the Constitution. But we have also seen that pluralism means different things to different people and the Constitution has not provided a single clear and concise interpretation of its meaning. The Amish, for example, found support for their separation from mainstream society while Blacks have found support for the integration into social institutions. Our review of cases has, however, managed to unearth some general principles which courts use in defining American

pluralism. We can conclude that the Constitution generally protects citizens from arbitrary or unreasonable control by the government and protects the right of parents to raise and educate their children as they see fit even if this life style is inconsistent with existing social patterns. But we have also seen that this right is limited to a large extent to its expression through private institutional means and that even in the private sector it may be limited if a threat to the well-being of society exists.

In regards to equal educational opportunity we can conclude that the racial or ethnic separation of children in schools is impermissible and that school systems must pursue a policy of integration. It is possible, however, to have a school which has a population that is predominantly one ethnic group providing this neither contributes to nor is a result of discrimination. Furthermore, school systems must provide instruction for non-English speaking students in a language from which the students can benefit and/or teach them remedial English.

While useful, these general principles will provide (only) general guidance in the design of multicultural and bilingual projects. Courts are reluctant to rule in a broad and sweeping manner and are much more likely to apply certain principles to a specific case in a specific context. Because of this individual treatment we should expect multicultural and bilingual education to vary from group to group and situation to situation. Note, for example, that in Keyes v Denver some schools were allowed to remain predominantly Chicano while in Lee v Johnson a Chinese-American school was denied a similar request. Each multicultural project, then, must be assessed in terms of general legal

principles as they apply to that particular setting. In addition, state law will influence local project design. While federal law supersedes state law, it provides only the minimum standards with which districts must comply, leaving much to state discretion. State constitutions and legislation, then, generally are more specific in defining legal requirements and must be considered prior to the establishment of any multicultural program.

Perhaps the first step in the designing of a multicultural/bilingual project will be to assess the relevant contextual variable of the situation. These will include local legal requirements, cultural, social, and educational variables, demographic data, and the like. These factors will determine the thrust of any project and will necessarily lead to project diversity. For example, it should be evident that the contextual variables for Guam will differ radically from those for San Francisco; that those for Native Americans in or on the fringes of a metropolitan area will differ from those of Native Americans in isolated geographic areas; and that those for urban Blacks will differ from those of rural Mexican-Americans.

Once the relevant variables have been assessed the legal principles can be applied. Projects, however, should not be designed around legal considerations alone but rather should use those considerations only as a general guide. As we have seen, often the legal requirements set down by the courts are assimilationary in nature. If assimilation is not the primary goal of the relevant group, projects will need to go beyond minimal legal requirements and establish procedures and

guidelines to enhance more positive outcomes. In this sense, legal principles are seen as minimal requirements on which to build a responsive multicultural program.

Currently there is a search for the "real" meaning of pluralism, or at least a national model, capable of resolving conflict and debate. The courts have been looked to as one source for such a model. However, if the spirit of pluralism is to be followed we should not expect to develop one national model but, rather, a number of regional and local models to ensue which meet the needs of each respective group.

NOTES

1. Meyer v Nebraska, 43 S. Ct. 625
2. Ibid. 626
3. Ibid.
4. Ibid. 627
5. Ibid. 626
6. Ibid.
7. Wisconsin v Yoder, 406 U.S. 205
8. Ibid. 211
9. Ibid. 214
10. Ibid. 215-216
11. Ibid. 218
12. Ibid. 222
13. Ibid. 238
14. Reynolds v U.S., 98 U.S. 145
15. Ibid. 161
16. Prince v Commonwealth of Massachusetts, 64 S. Ct. 438
17. Ibid. 442
18. Jacobson v Massachusetts, 25 S. Ct. 358 (1904)
19. People v Pierson, 68 N.E. 243 (1903)
20. Pierce v Society of the Sisters, 268 U.S. 510
21. Ibid. 534
22. Pierce v Society of the Sisters, 45 S. Ct. 573
23. Barnette v West Virginia, 319 U.S. 624 (1943)
24. Ibid. 634
25. Ibid. 637

26. Ibid. 642
27. Abengton School District v Schempp, 374 U.S. 203 (1963)
28. Plessy v Ferguson, 163 U.S. 537 (1896)
29. Brown v Board of Education of Topeka, 347 U.S. 483 (1954)
30. Ibid. 486
31. Ibid. 493
32. Ibid. 494
33. Ibid.
34. Brown v Board of Education, 349 U.S. 294
35. Ibid. 298
36. Ibid. 300
37. Griffin v County School Board of Prince Edward Co., 377 U.S. 218 (1964)
38. Ibid. 229
39. Ibid. 231
40. Green v County School Board of New Kent Co., 88 S. Ct. 1689
41. Ibid. 1693
42. Ibid. 1694
43. Swann v Board of Education, 402 U.S. 1
44. Ibid. 22
45. Ibid. 22-25
46. Ibid. 25-26
47. Ibid. 27-29
48. Ibid. 29-31
49. Ibid. 31-32
50. Ibid. 20-21
51. Johnson v San Francisco Unified School District, 339 F. Supp. 1315
(ND Cal. 1971)

52. Guey Heung Lee et al v David Johnson et al. 404 U.S. 1215 (1971)
53. Ibid.
54. Lee v Johnson, 339 F. Supp., 1323
55. Hernandez v Texas, 347 U.S. 475 (1954)
56. Cisneros v Corpus Christi Independent School District, 467 F. 2d., 142 (1972)
57. U.S. v Texas, 342 F. Supp 24 (1971) aff'd
58. Ibid. 25
59. Ibid. 26
60. Ibid. 28
61. Lau v Nichols, 94 S. Ct. 780 (1974)
62. Lau v Nichols, 483 F 2d. 797
63. Ibid.
64. Lau v Nichols, 94 S. Ct. 788
65. Serna v Portales Municipal Schools, 351 F. Supp. 1279 (1972)
66. Lau v Nichols, 94 S. Ct. 790
67. Keyes v School District No. 1, Denver, Colorado, 380 F. Supp. 673 (1974)
68. Ibid. 692
69. Ibid. 687
70. The substance for this section is taken from Daniel M. Rosenfelt, "Indian Schools and Community Control," Stanford Law Review, Vol. 25, 489, 1973.
71. Worcester v Georgia, 31 U.S. 16 Pet. 214 (1832)
72. Williams v Lee, 358 R.S. 217, (1957)
73. Rosenfelt, op cit.